IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

The Consolidated Canal Company,
APPELLANT,

vs.

The Mesa Canal Company,
RESPONDENT.

REPLY BRIEF OF JOHN D. POPE, Attorney for Appellant.

The assignment of errors is as full and explicit as it was possible to make it.

There is no attempt by counsel for respondent to controvert any of the legal propositions advanced in appellant's opening brief, namely, that neither the canal above the division gates nor the water in that part of the canal is the property of respondent or is in any manner subject to its control; that the water in the canal before it reaches that part of it which belongs to respondent, the Mesa Canal Company, is subject to appropriation for any useful purpose which does not either di-

minish the quantity or deteriorate the quality of the water; that after the Consolidated Canal Company had created the water power at great expense the Mesa Canal Company had no right to change the place or manner of the use of the water so as to destroy the water power; and that injunction was the proper remedy. Counsel for respondent had the best of reasons for not combating any of these propositions; they are too well founded in law.

But counsel say that the contract between Chandler, the predecessor in interest of the Consolidated Canal Company, and the Mesa Canal Company, contained a provision that in doing what Chandler and his assigns were authorized to do, ~~provided that~~ it was to be done "without in any wise interfering with the rights, titles, interests or privileges of said party of the first part (the Mesa Canal Company) in and to said canal, and the water flowing through said canal, except as herein provided." This language cannot be understood as restricting the right of the Consolidated Canal Company to reconstruct the canal above the division gates nor to prevent the title to that part of the canal from vesting in the Consolidated Canal Company; for these things are plainly provided for in the contract. The right which the Mesa Canal Company had to the water was the use of it for irrigation purposes on the lands on which they had formerly used it and by the means which they had formerly employed, together with the right to change the manner and place of use, provided that in so doing no other appropriation of the water should be interfered with. It is manifest that the Consolidated Canal Company had as much right to use the water to turn a wheel placed in the division gates as it would have had to place an undershot wheel a mile higher up and have it turned by the flow of the water in the canal. Such use of the water could not in any manner affect any appropriation or use of the water which the Mesa Canal Company had made prior to that time. If the Mesa Canal Company had the right to change the place of use of the water to other lands than those on which it had formerly been used or to change the means of conducting it to the place where it was to be used,

all without reference to its effect upon that portion of the canal which was given over to the Consolidated Canal Company, it would follow that the Mesa Canal Company might take the water out of the river above the head of the Consolidated Canal and never allow it to come into its possession. But this would be as much against the plain intent of the contract between the parties as it would be a violation of the elementary principles of law respecting successive appropriations of water. The oldest appropriator cannot change the manner or place of use to the detriment of a junior appropriator.

The law in the arid regions of the country encourages the use of water in such manner as will render it most beneficial to the people; and it is preposterous for parties who have appropriated water for irrigation to object to its being used to operate machinery before it comes into their possession.

A material error of fact occurs in respondent's brief at page 6, where in speaking of backing up the water to a higher level than it had ever been raised before for the purpose of turning it into a new lateral ditch, counsel say that the Mesa Canal Company "was thereby enabled to use the water upon the lands upon which it had originally been used before said contract was entered into." There was no finding of fact by the court below to that effect, but if the court should look into the evidence it would see that while it is true that by taking possession of the water-fall created by the Consolidated Canal Company and constructing a new ditch at a higher elevation, the Mesa Canal Company could carry the water to some of the lands which it had formerly irrigated by means of a lateral ditch taken out at a lower level, because water will always flow down hill; but it will also appear that the chief object of the new lateral ditch at a higher level, which was so placed as to destroy the water power, was to convey water to lands where it had never been used before. In other words, the Mesa Canal Company proposed to change the manner and place of the use of the water to which it was entitled, regardless of the damage done to the water power which the Consolidated Canal Company had at great expense produced and which it intended to use for a beneficial purpose.

On page 5 of their brief, counsel for respondent say:

"If the appellant raised the grade of the canal by its reconstruction, such elevation should inure not only to the benefit of the Consolidated Canal Company, but also to the appellee. We deny any right or authority under or by virtue of said contract, or by any agreement, for the plaintiff to establish any water power or machinery on or along said canal or at said division gate."

If this is true, there is nothing to prevent the Mesa Canal Company from putting its own machinery in at the place of the water-fall to the exclusion of the Consolidated Canal Company which created it; and if there had been a fall established anywhere on that portion of the canal which is ceded to the Consolidated Canal Company, the Mesa Canal Company might put in machinery there and use it as it saw fit. In other words, the Mesa Canal Company could use or destroy as it might elect any work which the Consolidated Canal Company could do under the contract. With just as much reason it might be claimed that the Mesa Canal Company could turn the Consolidated Canal Company out of possession entirely, whenever it found it convenient or profitable to do so.

Speaking of the contract, on page 7 of their brief, counsel say: "It expressly denies to the appellant any right to the use of this water either to turn wheels, irrigate lands, or for any other purpose until it is delivered, and we take it that after it is delivered appellant has no right to use it." It has been shown that the contract does not do anything of the kind. The right of the Consolidated Canal Company to use any of the water to which the Mesa Canal Company is entitled, is provided against in the contract, but this denial, as we have shown, refers to such use of the water as would diminish its quantity or deteriorate its quality and thereby injuriously affect the appropriation which the Mesa Canal Company already had to the water.

On page 9 of their brief counsel for respondent refer to an alleged offer by the Mesa Canal Company to put in a flume above the water-fall and take out of the ditch whatever water it wanted to use and thereby do away with the necessity of

backing up the water below the fall and destroying the water power. If this court should deem it proper to look into the evidence to see if that claim is true as stated by counsel, notwithstanding the conflict in the evidence on the point, it would only be necessary to remember that if the Mesa Canal Company can take out part of the water above the fall and thereby diminish the power, they can take it all out and destroy the power altogether. They have the same right to destroy the power by backing up the water as they have to go above the fall and take the water out and destroy the power in that way. It ought not to be necessary to discuss such a proposition.

Finally, counsel for respondent say that the stockholders of the Mesa Canal Company ought not to be compelled to pay for water to use on their own lands near the division gates. In order not to have to do that, they propose to take advantage of the large expenditure of money by the Consolidated Canal Company made expressly to create a water power, even if they should thereby destroy the water power, and this without consulting the Consolidated Canal Company. This is but another form of denying the proposition that water is subject to successive appropriations. The right to make the second appropriation without diminishing the quantity or deteriorating the quality of the water carries with it the right to enjoy the benefits of the second appropriation. The law protects this right as much as it does the first appropriation. If the Mesa Canal Company had respected this familiar legal principle, there would have been no occasion for litigation between the parties to this action.

Respectfully submitted,

JOHN D. POPE,

Attorney for Appellant.